IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

FREDERICK F. FAGAL, JR.,	)	
	)	
Plaintiff	)	
	)	
vs	)	14cv2404
	)	
MARYWOOD UNIVERSITY,	)	
	)	
Defendant	)	
_____	)	

TRANSCRIPT OF PROCEEDINGS - ORAL ARGUMENT
BEFORE THE HONORABLE A. RICHARD CAPUTO
WEDNESDAY, OCTOBER 4, 2017; 10:30 A.M.
WILKES-BARRE, PENNSYLVANIA

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THE COURT: Okay, we're here on Cross Motions for Summary Judgment. And there's a motion, also, to amend the pleading.

Mr. Cohen, I think you should go first, since you have Plaintiff and your motion has more things in it than does the Defendant. So let's hear from you.

MR. COHEN: Sure. May I approach the podium?

THE COURT: Sure.

MR. COHEN: Your Honor, I re-read the summary judgment papers yesterday, and I realized that Your Honor must be very familiar with the issues already, and that's why I'm going to be very brief today, but I'll be happy to answer any questions.

I want to remind the Court that we're only arguing that the procedure in which Plaintiff was terminated was improper, and we are entitled to argue that under Murphy v. Duquesne University of the Holy Ghost.

In short, Marywood drafted and implemented a policy that requires a system of progressive discipline, beginning with an oral warning and ending in termination. Professor Fagal had no input into that policy. Under its own terms, the Progressive Discipline Policy appears to apply in all cases, as this Court found when it denied Marywood's Motion to Dismiss.

Marywood could have included exceptions, but they did not. We are here today because Marywood breached its own written policies. We think the policies are clearly written in a way that favors our position and that summary judgment should be

granted to us.

But if the Court finds that Marywood's policy are ambiguous, then, it is required to hold a trial. And that's under American Eagle Outfitters v. Lyle and Scott Limited, 584 F3d. 575 Third Circuit.

I do want to address Marywood's -- Marywood made its own Summary Judgment Motion, and we responded, and then Marywood filed a reply and I want to respond to that.

On Page 5 of Marywood's reply, Marywood states that;

"Further, while the policy outlines gradual steps for intervention and assistance, such as personal conferences, oral and written warnings and opportunities for monitored assistance, it explicitly states that they come into play where applicable, and by no means require that each outline strategy be implemented in every instance."

I think that's simply incorrect. I think there's one area of the Progressive Discipline Policy that says it applies only where applicable, and that's, I think, for monitored assistance. But it's incorrect to say that the policy only requires oral warnings or written warnings, when applicable. It simply doesn't say that.

Lastly, the parties have argued over a case involving a waiver of material breach, and that case is the Norfolk case and it's referred to on Page 11 of Marywood's reply.

Plaintiff's position is that that case simply does require

the party arguing material breach, that party is required to treat the contract as if there's a total breach and take legal action, and it has to risk the possibility that a Court finds that the breach is non-material. And the reason that the Court did not find that Norfolk Southern waived a material breach argument is that Norfolk took legal action shortly after it indicated that the Defendant was subvert in the contract. Marywood didn't do that and has never done that.

There is no counterclaim for breach of contract, and they can't do that now. We think it's simply too late to argue that there's been a material breach. That's clearly been waived.

And those are really the only points I wanted to highlight today, Your Honor. I'm happy to answer any questions, and I'll respond to Marywood's attorney, if permitted.

THE COURT: Well, I'm curious on the question of the warnings and the progressive discipline. Are you saying you could never discipline someone the way they disciplined this Plaintiff for an initial transgression?

MR. COHEN: The way the agreement is written, I think the answer is yes. I could imagine a circumstance where, for example, you know, a Plaintiff brought a gun on campus and started assaulting people, and there was an emergency. And, in fact, the agreement allows a suspension in cases of immediate harm.

But there simply seems to be no exceptions provided in the

policy, except now there is, because Marywood adopted a new policy after Professor Fagal's case, but the way it's written, it seems there are no exceptions, there should have been an oral and written warning here, and that wasn't done. And that's our position.

THE COURT: So in other words, the first transgression, unless it would be harmful to either the actor or someone else, you can't be, let me say, graphically disciplined, such as have a termination?

MR. COHEN: I think that's our position, Your Honor.

THE COURT: Okay, thank you. Ms. Peet.

MS. PEET: Yes, Your Honor. Good morning. We're here today because there's no genuine issue of material fact in dispute. In fact, the parties quite agree on many of the facts at issue here.

1. Plaintiff emailed, hosted and disseminated two You Tube videos where he depicted the president of Marywood University as Adolf Hitler wearing a Swastika, and various members of the Nazi regime, Marywood administrators as members of the Nazi regime.

After President Munley gave Plaintiff an opportunity to be heard, during which he refused to apologize and expressed no remorse, she notified him that he was being suspended and that she was recommending his termination.

The president's decisions were reviewed by his peers. The

university convened two separate committees, each comprised of three tenured faculty members, one of which was hand-selected by the Plaintiff. Although, Plaintiff doesn't think he engaged in inappropriate conduct and he feels he can engage in this hateful type of behavior, all of his peers unanimously disagreed, and they feel that, although, in their mind, termination is an extreme result, they felt it was wholly appropriate under the circumstances, given Mr. Fagal's totally inappropriate and extreme conduct.

THE COURT: Don't you have a problem with the termination having occurred before the committee said anything?

MS. PEET: It was a recommendation to term. So he engaged in this conduct, they had the meeting with him where he admitted to doing these actions, he refused to be remorseful, refused to be apologetic or accept responsibility, in any way.

She then notified him that he was being suspended and recommending termination. She sent him a statement of charges, which attached a document which asked him, "If you would like to us convene a committee to review this decision before making it final, you have 10 days to do so, per the policy."

He didn't do that.

They sent a revised statement of charges, per his counsel's request, that a page was missing. Not that page, but a page nonetheless, and he was given another opportunity to sign off and convene these committees.

He did not do that.

Ultimately, down the line, President Munley said, although you haven't done so and you only had 10 days to do it, you are now telling us that you want us to convene a committee and we're going to do that. And, in fact, she did.

They convened the Faculty Grievance Committee, which looked at the procedure of the suspension, the termination and the revocation of tenure. That decision itself is not appealable, but they do have the opportunity to convene an ad hoc committee. He requested that. At that time, they then convened it at that time, as well.

At that point is when they officially terminated his employment and paid him through August of 2012, although, his services were no longer needed.

Does that address your concern, Your Honor?

THE COURT: I thought he was notified he was terminated before the committee said anything?

MS. PEET: After the first committee approved, they notified that he was being terminated, and then he requested the other ad hoc committee. So throughout the course of the process, Plaintiff was somewhat combative and a little bit obstructionist, quite frankly.

If you see his emails from before he even posted these videos, before Marywood even had notice of these videos, he discussed a possible termination of his employment. His

colleagues expressed his possible termination of employment, and his response in every situation was, I'm just going to battle it. He was going to fight this, before he even did it.

THE COURT: Okay, but factually, can the president terminate him before the committee recommends it?

MS. PEET: It's the president of the university, she can. But as long as her decision is to give him due process, an orderly hearing and a Judicial-like proceeding, and they can overturn it, but they didn't, they solidified and determined that her decision was appropriate.

THE COURT: What about the suspension? What about that issue about whether or not the committee considered a suspension?

MS. PEET: The evidence of record is unequivocal and undisputed. They considered both the suspension, the termination and the revocation of tenure during those meetings and when they were preparing the report.

The testimony from Helen Biddle, Ed Belian(phonetic) and Matt Posky(phonetic) all said it was an exercise in futility to meet twice for the same reason, to prepare two separate reports for the same reason. The president reserves the right to have the same committee to be on both -- to discuss both, so it was just agreed that they would all serve on one committee, and they prepared the report addressing all of the issues.

There's no question, and, you know, you can look at Helen Biddle's testimony, that she said, Our process is kind of

ongoing, we have never done this before, but we absolutely considered the suspension, we considered the termination and we considered revocation of tenure.

THE COURT: Did the report make any findings about the suspension?

MS. PEET: Yes, they addressed the suspension, but it was more focused on the termination and revocation of tenure, for obvious reasons. There's no question that all of these three kind of disciplinary issues revolved around the same conduct, the posting of these hateful videos.

So the question is, what's the most extreme of these circumstances? I mean, it's more obvious -- if we find it's under the most extreme circumstance that the discipline is appropriate, obviously, a lesser offense would be similarly appropriate, as well, and that's the way they addressed it.

So Mr. Fagal's case, the entire case is premised on his contention there was some procedural defect in the way that Marywood applied its contractual obligations. Obviously, Marywood disagrees, for the reasons set forth in the motion, and I'm happy to discuss them today.

But more importantly, what Mr. Fagal doesn't address and which is the third element of a breach of contract claim is resultant damages. So from our perspective, Your Honor, this is a big case of no harm, no foul.

Even if Alan Levine, Vice-president of Academic Affairs,

who is Jewish and was conveyed as a Nazi and was infuriated with his behavior, even if he communicated the suspension decision to Plaintiff instead of Sister Munley. So what?

Even if Mr. Levine actually filed the formal complaint, pursuant to the Civil Rights policy. So what? Mr. Fagal has the burden of proof in this case, and there's not a scintilla of evidence which establishes the outcome at the end of this case, the termination and revocation of tenure would have been any different. That's not what he's arguing.

What this case is all about is he got what he bargained for. He got the due process, he got the notice and opportunity to be heard, the Judicial-like process, an orderly proceeding. He's not arguing he didn't get a bargain for a value, he's arguing he doesn't like how he got there.

Now, this case -- and it's clear in Murphy v. Duquesne that a contract between a professor and a university is no different than any breach of contract between private parties. So if we take a contract for the sale of goods. No different. If you and I contract for a sale of widgets, we have a contract that talks about how many widgets I'm going to sell you and what the quality of those widgets are going to be, and how they're going to get delivered and the price and so forth.

Let's say the contract says they're going to be delivered to you by FedEx in four boxes. And they come to you in a timely fashion, in good quality and the right price, but it's not a

FedEx truck that shows up at your house, it's UPS. Although, we didn't think we could get it into -- four boxes into three, in fact, they all fit into three boxes.

So the contract says four, they show up and they're three. Okay, so maybe there's some technical defect in the contract, maybe they weren't applied to the letter, as Plaintiff suggests, but so what? Again, a case of no harm, no foul.

There's no resultant damages here. The outcome would have been the same. He got the value. He's not arguing against that. He's just saying maybe there was a different way we could have got him there. But without the resultant damages, he cannot, as a matter of law, establish a breach of contract claim.

And I want to direct Your Honor to a case that's not cited in the brief, but I think it's helpful to show the resultant damages and how this technical defect can be viewed.

It's Giacone v. Virtual Officeware, LLC, it's a Western District of Pennsylvania case, and it is Lexis 2014 U.S. District Lexis 172633.

This is a breach of contract. It happens to be in the employment relationship, although, not between a professor and the university.

In this case, there was a dispute over whether the company followed the notice provision of the person's employment contract when they were terminating his employment. And the Court says;

"Well, the manner of "notice" was not technically consistent with the employment agreement, Defendants have failed to prove that the breach was material. Specifically, the manner in which Plaintiff's notice of termination was delivered did not technically comply in one respect with the notices paragraph of the employment agreement."

Then it cites the agreement;

"However, there was no legitimate contention that Defendant didn't receive actual notice of Plaintiff's termination letter. Rather, the form of the delivery does not constitute a material breach by Plaintiff under the facts of this case, and it does not evidence that Plaintiff was attempting to skirt his good faith and fair dealing obligation, with regard to notice.

"When a party has honestly and faithfully performed all material elements of the obligation of the contract but failed to fulfill certain technical obligations, causing no serious detriment to the injured party, it would be odious and inequitable to compel the forfeiture of the entire contract.

"Instead, our Courts apply the Equitable Doctrine of Substantial Performance."

Then it cites two cases, both in Pennsylvania.

"If a breach is an immaterial failure of performance and the contract was substantially performed, the contract remains effective. No breach."

THE COURT: So you're saying there's no material breach, or

if there were -- you're saying, as a matter of law, there was no material breach.

MS. PEET: I think my argument is a little bit more two-fold. From our perspective -- actually, three-fold. There was no breach, material or otherwise. The contract gave us leeway to do what it is that we did.

Two. To the extent there's found to be some sort of a deviant, that yes, it's, immaterial versus material.

But three, and this is where Plaintiff's motion kind of falls away, and he doesn't address in our opposition is the resultant damages piece.

I understand that he was out of a job and that now he had to look for a job, and he spent one hour per week and sent one application in a matter of four years, I understand that. But that would have happened, anyway, because he would have been terminated. Even if President Levine -- Vice-president Levine communicated the decision. Even if they had two separate committees with the same committee members, and they prepared two separate reports. The result would have been the same, and he hasn't proved otherwise, and, quite frankly, he has the burden of proof in this case.

So, Your Honor, with all of that being said, we submit that there is no genuine issue of material fact. Plaintiff has not met his burden of proof in a breach of contract case, for all of the reasons I have mentioned, and judgment is entitled to

Marywood University as a matter of law.

THE COURT: All right, thank you. Mr. Cohen. Before you say anything, what is your position about Ms. Peet's position regarding damages?

MR. COHEN: Your Honor, our position is the following:

For many years, the position of the Pennsylvania Courts is that a party who has had a contract breached does not need to have monetary damages. He or she or it can have nominal damages. And that goes back a long way.

And, you know, we think that our original complaint covers that, you know, in its prayer for relief, but in a belt and suspenders approach, we move to amend and, specifically, ask for nominal damages. So we think that Marywood is wrong about that.

We also think that the no harm, no foul argument, we think that's a weak argument, because what the Plaintiff was entitled to here was, first, an oral warning to come into compliance. No one said to him, Professor Fagal, this is a violation of the core values, you need to take this down immediately. If you don't, we're going to proceed to a written warning.

None of that happened. If that had happened -- and we don't know that because Marywood never tried it -- it's very likely that the video would have been taken down, which it was, and that's our position on that matter.

I also want to address, Ms. Peet said that the report of

the committee mentioned suspension. I don't think it does. If you look at the report, it simply doesn't mention suspension.

So those are all the points I wanted to make, Your Honor.

THE COURT: All right, thank you.

MS. PEET: May I, briefly?

THE COURT: I'll give you the last word.

MS. PEET: Thank you. I do like the last word.

THE COURT: Doesn't everybody.

MS. PEET: Your Honor, with all due respect, Mr. Cohen is missing the point on the damages argument. We're not saying there's no monetary value at issue here, we don't get there because the damages have to be -- it's resultant damages. We're not talking about actual or nominal.

The breach of contract, since decades, has said resultant damages, meaning, he had to have been damaged as a result of Marywood's conduct. What we're saying is, even if those alleged procedural defects didn't take place and they were followed, the end result would have been the same.

He was given his opportunity and notice of being heard. He was given the opportunity to have two separate committees convene, hear what he had to say, review all of the evidence and make their determinations. All of that happened.

So whether or not he was given an oral or written warning first or if, again, if Mr. Levine communicated the decision, it wouldn't have impacted the end result, which is termination and

revocation of tenure. No resultant damages.

THE COURT: How do you deal with the progressive discipline thing? I asked him about the idea that it doesn't appear, at least, not in his interpretation, if I'm reading it right, that you can do what you did on the first transgression or first offense, I hate to use that word, because it's not an offense, but the first breach of the disciplinary standards, let's say. How do you respond to that?

MS. PEET: Sure. If you actually see the policy -- may I just grab it, Your Honor?

THE COURT: Sure.

MS. PEET: In short, it has two separate categories for conduct. Mr. Fagal's would fall in the second. So it recognizes two different types of situations, one being personal or professional problems that may be rectified by informal educational process.

Then, the second, the serious violation of professional responsibilities implicating possible recommendation for suspension or dismissal.

So from our perspective, it absolutely allows the university to go straight to a suspension, even dismissal, under extreme and appropriate circumstances, which were the circumstances that were addressed here.

In the next paragraph, it uses the word that this policy is meant to be a flexible means, a guide, something to use as a

template for the parties to kind of transgress through the process.

As it relates to suspension and termination. What they're saying is a professor can go ahead and rape a student -- I'm saying horrible things -- but under their theory, it's true, that he could steal from students, he can do totally horribly inappropriate things, and yet he would still need to go through progressive discipline and getting an oral or written warning first? It just doesn't make sense, and it's not what the policy requires.

He took to mention a little bit about immediate harm. The past several weeks have, I believe, highlighted how severe the words Adolf Hitler and Nazis and Swastikas, what they do to people. They evoke emotions, and people do react harshly to that type of symbol, to those types of feelings, and to not think there was going to be some sort of a harm, when a professor of a university is putting that out in the public, how that's going to make people feel and how people are going to react?

What does the university have to do? Wait for someone to get harmed? Wait for someone to file a lawsuit against them for keeping the professor in their employ. If it can't terminate a professor in these circumstances, putting hateful speech about the Marywood professor, about other members of the Marywood administration, sending it to people at their Marywood email

accounts, students and professors alike, posting it for the public to see, the times have told us that this is serious, and there is a significant threat of harm, because we don't know how people are going to respond, because people will respond pretty seriously.

THE COURT: That may or may not be any of my business, but isn't that a slippery slope?

MS. PEET: No, I just think it goes to the point of, we're not here to talk about the substance of the termination nor can he, but when you're talking about there's no immediate harm, and his whole position was just some comical joke, it was a parity of a satire, that's not how a lot of people view this. And this case, quite frankly, is very timely, in that we're in an environment where we're dealing with these type of issues, and there's a lot of people that don't think this type of discussion is funny and comical, and some of those people just so happened to be the ones that were attacked, and the university acted appropriately.

But in all due respect, substance aside, it followed procedure, in our position it followed it to the T, because it was given flexibility in various instances. They have a very different interpretation. Doesn't mean that Marywood had to follow their interpretation of its policies.

And, again, even if there was a breach, immaterial, but probably most important, no resultant damages.

THE COURT: All right, thank you. Thank you all very much.

MS. PEET: Thank you, Your Honor.

MR. COHEN: Thank you, Your Honor.

THE COURT: You'll hear from us shortly. We're adjourned.

(At this time the proceedings were adjourned.)

C E R T I F I C A T E

I, KRISTIN L. YEAGER, Official Court Reporter for the United States District Court for the Middle District of Pennsylvania, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a true and correct transcript of the within-mentioned proceedings had in the above-mentioned and numbered cause on the date or dates hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my supervision.

S/Kristin L. Yeager
KRISTIN L. YEAGER, RMR,CRR
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